

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2023/HP/973



BETWEEN:

**IN THE MATTER OF : REMOVAL OF CAVEAT ON PROPERTY
KNOWN AS STAND NO. 14, MUMBWA
IN THE MATTER OF: SECTION 81 (1) OF THE LANDS AND
DEEDS ACT CHAPTER 185 OF THE
LAWS OF ZAMBIA**

HILTON LUPIYA

1ST APPLICANT

WILLARD LUPIYA

2ND APPLICANT

**(Suing as administrators of the estate of the late TEDDIE
SACHABWAKA LUPIYA)**

AND

PATRICK LUPIYA

1ST RESPONDENT

ATTORNEY GENERAL

2ND RESPONDENT

***Before The Hon. Justice M. D. Bowa in Chambers on 12th of
December 2023.***

For the Applicant: Mr. A Tembo of Tembo Ngulube & Associates

For the Defendant: S. Tembo Mambwe State Advocate-

JUDGMENT

Cases referred to

1. *Simeza and Others vs. Mzyeche SCZ no 23 of 2011*

2. *Imbwae vs. Imbwae* SCZ no 12 of 2003
3. *Sobek Lodges Ltd vs. Zambia Wildlife Authority* 2011 2 ZR p235
4. *Lenton Holdings Vs. Moyo* 1984 ZR p55

Legislation referred to:

1. *The Lands and Deeds Registry Act Cap 185 of the Laws of Zambia* S,76,81&82
2. *The High Court Act Cap 27 Of the Laws of Zambia*

1. **Introduction**

1.0 The Applicants commenced this action by originating summons dated 7th June 2023 seeking the following reliefs:

1. *An order that the Respondent remove the caveat he placed on stand No 14 Mumbwa.*
2. *An order for compensation to the Applicants against the 1st Respondent for maliciously placing the caveat on stand No. 14 Mumbwa.*
3. *Any other relief the court may deem fit.*

2. **Affidavit Evidence**

2.1. The affidavit in support was jointly sworn by the Applicants Hilton Lupiya and Willard Lupiya. It was deposed that the Applicants are the legal Administrators and beneficiaries of stand No. 14 Mumbwa. Exhibited “**WHL1-2**” are copies of the certificate of title and order of appointment as administrator. It

was averred that upon conducting a search at the Lands and Deeds Registry, it was discovered that a caveat was placed by a known person claiming an interest in the stand. A lands Register confirming this was exhibited **“WHL3.”**

2.2 The Applicants averred further that the 1st Respondent later agreed to remove the caveat but has refused to surrender the caveat that he lodged as well as the NRC which documents are needed by the 2nd Respondent to do so. The Applicants further contended that the 1st Respondent had no interest in the property to justify the sustenance of the caveat. The Applicants thus find desirable that an order to remove the caveat be made by the court.

2.3 The 2nd Applicant swore a further affidavit in support of the originating summons dated 4th September 2023. He deposed that the 1st Respondent and one Zelda Lupiya were administrators of the estate for their late father but stepped aside. A formal order was sought and obtained to that effect. Exhibited **“WHL 1-7”** are copies of the order of appointment,

originating summons and order including the agreement to step aside in respect of Patrick Lupiya the 1st Respondent.

2.4 The Applicants filed into court a list of authorities and skeleton arguments dated 7th June 2023. It was submitted that the court has power to grant the order sought in terms of section 81 (1) of the Lands and Deeds Registry Act Cap 185 of the Laws of Zambia. It was further argued that the Applicants are entitled to compensation as the 1st Respondent had without reasonable cause, placed the caveat on the property in issue. Consequently, that the Applicants have missed out on opportunities of selling the property to prospective purchasers.

2.5 Section 82 of the Lands and Deeds Registry Act was relied on for the claim for compensation. The Applicants prayed that the order for the Respondents to remove the caveat placed on the property and requisite compensation be granted accordingly.

2.6 The Respondents neither made appearance nor filed any opposition to the application.

2.7 At the date slated for hearing, the learned state advocate on behalf of the Attorney General informed the court that the State

would not be opposing the application. The 1st Respondent was not in attendance and did not sufficiently excuse his absence. I therefore proceeded to hear the application premised on order of Order 35 Rule 3 of the High court rules Cap 27 of the laws of Zambia which provides that:

“3. If the plaintiff appears, and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the Court may, upon proof of service of notice of trial, proceed to hear the cause and give judgment on the evidence adduced by the plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the defendant.”

2.8 Furthermore, Order 12 rule 8 of Cap 27 as amended by Statutory Instrument no 71 of 1997 provides that:

“ 12 (8) In all actions not otherwise specifically provided for by the other sub-rules, in case the party served with the writ of summons does not appear within the time limited for appearance, upon the filing by the plaintiff of a proper affidavit or certificate of service, the action may proceed as if such party had appeared.”

2.8 I was also guided by the Supreme Court decision in the case of **Simeza and Others vs. Mzyeche**¹ in which the court upheld the decision of a Deputy Registrar to proceed with a matter in the absence of the appellant whom it was established had notice of the proceedings. In citing with approval its earlier decision made in the case of **Imbwae vs. Imbwae**² Musonda J who read the judgement of the court observed that:

“.. No procedural injustice is occasioned when a party who is aware of the proceedings does not turn up”

3. Court’s consideration

3.1 That said, I have considered the application and affidavit before me. The application is made pursuant to section 81 of the Lands and Deeds Registry Act Cap 185 of the Laws of Zambia providing for removal of caveats. To have an appreciation of the relevant legal regime on caveats under the Act, a useful starting point would be section 76 which provides that:

“Any person:-

a) Claiming to be entitled to or be beneficiary in any Land or any estate or interest therein by virtue of any unregistered agreement or other

instrument or transmission, or of any trust expressed or implied, or otherwise howsoever; or

b) Transferring any estate or interest in Land to any other person to be held in trust; or

c) Being an intending purchaser or mortgagee of any Land;

May at any time lodge with the Registrar a caveat in form 8 in the schedule.”

Section 81 of the Act provides that:

“81 (1) such registered proprietor or other interested person, may if he thinks fit, summon the caveator, or the person on whose behalf such caveat has been lodged, to attend before the Lands tribunal, court, or judge thereof to show cause why such caveat should not be removed.

(2) Such Lands Tribunal court, or Judge upon proof that such person has been summoned, may make such order in the premises, either ex parte or otherwise, as to such Lands Tribunal, court, or Judge seems just”

3.2 From the above provisions of the law therefore, it is evident that the law seeks to protect a party with an interest in land as defined in section 76 from adverse claimants registering an interest in the Land, through the placement of a caveat. An

aggrieved party such as the registered proprietor or other interested person may challenge the placement of the caveat through an application to the High Court for its removal.

3.3 Lastly under section 82, a malicious caveator is not absolved from liability in damages if it can be established on the facts that he had no reasonable cause or basis on which to place the caveat and some damage may have been sustained by an innocent aggrieved interested party in the process.

3.4 In **Sobek Lodges Ltd Vs. Zambia Wildlife Authority**³, Matibini J as he was then, duly observed that although the originating proceedings in an application for the removal of a caveat is at the instance of an Applicant, section 81 of the Lands and Deeds Registry Act shifts the burden of showing why a caveat should not be removed on to the Respondent.

3.5 Further, In the case of **Lenton Holdings vs. Moyo**⁴, the Supreme Court held that to be effective a caveat must disclose the interest claimed. In other words, the Respondent must be able to demonstrate the interest he has in the property as

defined under section 76 of the Act and then go further to show cause why the caveat should not be removed.

3.6 Based on the facts before me, it is common cause that the 1st Respondent did not enter an appearance nor file an affidavit in opposition. The Applicant's interest in the property is disclosed in the affidavit in support. They have deposed to the fact that they are administrators and beneficiaries of their late father's estate. I thus find that there are interested persons within the meaning placed in section 81(1) of the Act.

3.7 Further evidence is that the Respondent was administrator of the estate but stepped down from the role. The 1st Respondent and the applicant share the same surname so this is quite clearly a family dispute. The Applicants contend that the 1st Respondent has no interest in the property. I have no way of telling if this assertion is on account of the 1st Respondent having acquired his share of the estate. The court was more or less placed in a position of speculation as no detail was provided.

3.8 However, the 1st Respondent still bore the burden of establishing his interest and justifying why the caveat must be maintained. This he has not done as he has not mounted any challenge to the application.

3.9 I further note that the caveat was placed in 2012 a clear 11 odd years ago, and that there is no evidence of the Respondent taking any steps to enforce any claim to the property through an action in the courts of law.

3.10 Section 81 (2) of the Act provides that a court may proceed to grant an order removing a caveat even on an ex parte basis. The section reads that:

“Such court or judge upon proof that such person has been summoned, may make such order in the premises, either ex parte or otherwise, as to such Lands Tribunal, court, or Judge seems meet”

3.11 On the whole therefore, as there has been no affidavit in opposition filed or explanation rendered by the Respondent to show cause why the caveat should not be removed in terms of section 81 (1) and 81 (2), I hereby grant the application prayed

for and order the removal of the caveat placed on stand No. 14 Mumbwa forthwith.

3.12 I find that there was no evidence placed before me to suggest that the Applicants may have sustained damage as a result of the caveat being placed aside from the submission that they lost an opportunity to sell the land. This disclosure it will be noted, was in the submissions and not an averment in the affidavits before court the proper place for evidence. I would as such invariably dismiss this claim for being nothing more than an attempt to give evidence from the bar. I accordingly find that the conditions set in section 82 have not been met and consequently do not order any compensation.

Costs are for the Applicants to be taxed in default of agreement.

Dated at Lusaka this.....12th.....day of December.....2023



HON. JUSTICE M.D BOWA